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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-853

UNITED STATES STEEL CORPORATION
and
U. S. STEEL HOMES CREDIT CORPORATION, - - - - - - - - - Petitioners

versus

FORTNER ENTERPRISES, INC., - - Respondent

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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COUNTERSTATEMENT OF QUESTION PRESENTED

When the Sixth Circuit Court of Appeals decides that there were fact issues concerning "sufficient economic power" over the tying element in a per se Sherman Act Section 1 case, and when the fact finder below then finds such economic power to exist, and the Sixth Circuit then affirms, is this a basis for granting a Petition for Writ of Certiorari?

STATEMENT OF THE CASE

Petitioners correctly set forth the long history of the trials and appeals of this case. Unfortunately, that is about all they do in context.

Based on the 1969 Opinion of the Supreme Court in this case, 394 U.S. 495, in 1971 (452 F. 2d 1095) the Sixth Circuit held that there were fact issues concerning the economic power issue of the tying claim for resolution by a jury and that the District Court's directed verdict for Fortner in 1970 on Liability was therefore not proper. The Sixth Circuit in footnote 4 at the end of its 1971 Opinion (452 F. 2d 1095, at p. 1103) points out that the entire range of evidence bearing upon the economic power issue should be considered by the jury upon retrial. This included *all* of Fortner's evidence as well as *all* of Petitioners' evidence.

By agreement, jury trial was waived, with the District Court to become fact finder. Respondent and the District Court thought this would bring an end to this thirteen year old case but Petiioners have continued to flail.

In 1975 the question before the Sixth Circuit was whether the District Court's *fact finding* of economic power was clearly erroneous.[1] It could hardly have been otherwise, since the Supreme Court and the Sixth Circuit had already decided that there were fact issues for a fact finder to resolve on the economic power issue.

Procedurally we should point out that no real legal issues were before the Sixth Circuit in 1975, since the

[1]Fortner Enterprises, Inc. v. United States Steel Corp., 1975-2 Trade Cases ¶60,521 (6th Cir. 1975).

law of the case had been established and the only legitimate question raised on appeal was whether the District Court's Findings were clearly erroneous.

Petitioners seek to narrow the findings and fragment them as they have persistently done in the past to no avail. For that reason, however, we feel compelled to set forth below a summary of the facts developed in this case as found by the trial court as fact finder.

(A.) The Facts

Land was available in southern Jefferson County, Kentucky, in an existing subdivision in 1959 and 1960, and this land was owned by a corporation in which A. B. Fortner had an interest. The Homes Division of United States Steel Corporation became interested in the project and in an effort to induce sales of their prefabricated house packages they had the Credit Corporation enter into negotiations with plaintiff for the purpose of offering financing assistance for land acquisition and development and construction funds for purchase and erection of the houses. The Credit Corporation offered plaintiff 100% of the cost of the land and cost of development (JA 214-215), provided that it agree to purchase the United States Steel house packages for use in the subdivision (JA 221). This offer of financing was unique, unusual and attractive to plaintiff. Mr. Fortner testified that he would not have agreed to purchase the U. S. Steel homes but for the financing offered (JA 227).

As a result of the offer, notes, a mortgage and a loan agreement were executed in October, 1960 (JA 44-74) in favor of the Credit Corporation. The notes were based on 6% interest and a fee or discount of one-half of 1%. The Loan Agreement specifically contained the tie-in provision requiring the plaintiff to purchase the house packages from United States Steel Corporation and erect them on the lots in the subdivision (JA 47). There is no dispute but that this was a tie-in agreement for the benefit of the third party defendant United States Steel Corporation.

These loans were offered to plaintiff under the so-called special financing program of the Credit Corporation and this program is explained in a letter from the president of Homes Division to the Assistant General Solicitor of United States Steel Corporation (PX 238; JA 1275-1276), as follows:

> "Beyond the 'regular' program of financing assistance offered to qualified builders and negotiated by the Credit Corporation there exists a program of 'special' assistance which provides a greater amount of interim financing participation in selected markets with selected dealers. Fortner represents one of the latter. In these cases our sales department in an attempt to obtain distribution in a new market or to supplement distribution in an existing market, will discuss the possibility of a building program using U. S. Steel Homes with a dealer who is believed to have the necessary qualifications to be successful. Frequently the builder states a need for substantial interim financing to support the program and after

> commercial evaluation and a satisfactory preliminary check of credit and reputation, a recommendation is forwarded to U. S. Steel Homes Credit Corporation that negotiations be undertaken to arrive at a satisfactory basis for financing assistance consistent with the conditions which exist in each instance. In certain cases where Credit Corporation states that the amount of assistance provided in relation to the value of the security is beyond the normal limits of a purely financial transaction, Homes Division underwrites the financial transaction, Homes Division underwrites the arrangement so as to protect Credit against potential losses. Our agreement with Fortner is in this category."

Fortner Enterprises, Inc., obtained from the defendant, United States Steel and the Credit Corporation during the course of discovery numerous documents. Those pertinent to Fortner's case were introduced into evidence and constitute compelling and unrefuted evidence against the defendants.

The Homes Division of United States Steel made a presentation to the Finance Committee of United States Steel at its January 12, 1954, meeting (PX 1-M; JA 1085). That recommendation was that a financing corporation be established to provide *construction money* and to *originate mortgages* for resale to investors (JA 1088-1089). It was specifically understood at that time that the proposed finance corporation ". . . will not be used as a means to force sales to dealer-builders" (Paragraph 2(b) PX 1-M; JA 1090).

The Credit Corporation was established as a result of that authorization and presentation.

There was a change of policy in 1958. The Finance Committee Minutes (PX 1-W; JA 1095-1096), in order to enable the Homes Division ". . . to attain a minimum distribution of 1,800 units in 1959, and such additional distribution as may be feasible . . ." authorized and directed the Credit Corporation to make loans to dealers to effectuate that purpose ". . . without conformity with conventional or conservative patterns but within the bounds of prudent business judgment;" provided that the Homes Division underwrite and guarantee losses to a defined extent. This was the "special" financing program instituted by the Credit Corporation and it was continued through at least 1961 (JA 1098).

A formal Underwriting Agreement was entered into between Homes Division and Credit Corporation dated March 30, 1962, covering those loans made under the special financing program which were still in existence as of that date and setting forth the procedure for the making of loans under the special financing program (PX 237; JA 1268-1272). The procedure set forth therein was for Homes Division to request Credit Corporation to make a loan as a "financial risk" and if Credit Corporation refused then Homes Division would "direct" Credit Corporation to make a loan as a "commercial risk" in reliance upon the underwriting of the loan by Homes Division (JA 1271).

The attachment to that Underwriting Agreement (JA 1272-1274), lists the loans guaranteed by Home

Division and this included the land acquisition loans to Fortner. It also listed the other land acquisition loans guaranteed by Homes Division under the special financing program according to the testimony of W. H. Lang, President of the Credit Corporation (JA 976 and 980). Twenty-nine of the forty-three loans guaranteed in that Underwriting Agreement involved overall loans in excess of $250,000.00 (JA 980; JA 1194-1196). All of the loans on the attachment to the Underwriting Agreement covered the high risk type loans under the special financing program (JA 981).

The defendants admitted that Credit Corporation's loan commitments for 1960 were $22,625,805.00; for 1961 were $19,342,612.00 and for 1962 were $19,283,544 and that all such loan commitments with certain minimal exceptions totaling $627,000.00 ". . . involved loan agreements and/or mortgages which contained a provision or provisions requiring the borrower to purchase and erect on the land described therein house packages manufactured and sold by the Homes Division of United States Steel Corporation so long as the loan or loans or any portion thereof remained outstanding . . ." (JA 742-743). The defendants own admission therefore was that *all* of its loans were conditioned upon the tie-in provisions complained of by Fortner Enterprises in this suit except a few small ones.

The defendants further admitted:

> "That the estimated percentages of total shipments of house packages by the Homes Division which were made to dealers receiving financial as-

sistance from the Credit Corporation for the years 1960, 1961 and 1962, are as follows; 1960, sixty-eight percent; 1961, seventy percent; 1962, seventy-five percent." [JA 742; 780]

Thus, in 1960 and 1961, 68% to 70% of all sales were accounted for by loans involving the tie-in.

Land financing loans outstanding alone amounted to $5,372,000 at the end of 1960 (JA 1353), while house package sales amounted to $6,747,353 (JA 1199). At the end of 1961 land financing loans outstanding were $5,918,000 (JA 1353), while house package sales were only $5,051,992 (JA 1199).

A more significant fact is that the original amounts of the loans dated prior to the end of 1961 listed in the attachment to the Underwriting Agreement total $7,738,000 (JA 1273-1274) well in excess of the total land financing loans outstanding at the end of 1961 of $5,918,000. As previously indicated, Mr. Lang testified that all the loans on the Underwriting Agreement were land financing loans of the special category.

Fortner Enterprises was one of the companies which was obtained as a dealer through the special financing program. The land loans were equal to 100% of the cost of the land acquisition and development and the loans were at 6% interest with a service fee on discount of one-half of 1%.

One of the key exhibits introduced in evidence was Plaintiff's Exhibit 240 obtained from United States Steel (JA 1279-1299). This is a copy of a presentation given at a seminar for Homes Division personnel on March 27, 1961, by a Homes Division employee

named Neil Day, Manager of Field Sales (JA 440-445), as identified by Stanley Mack, Manager of the Sales Division of Homes Division during 1959 through 1962 (JA 439). Mr. Mack read certain portions of that exhibit, which was also a part of the Homes Division Sales Manual during the course of his testimony (JA 445-449).

Plaintiff's Exhibit 240 first points out that any land acquisition and development loan is a higher risk loan (JA 1287), and the regular Credit Corporation loan of that nature was 60% of the cost of land and development (JA 1288). The exhibit goes on to point out that Credit Corporation's land acquisition and development loans were based on 6% interest and one-half point fee which was very attractive compared to other manufacturers who charged a 10% fee or more in addition to simple interest (JA 1291). This exhibit points out that the special financing program was in effect and was negotiated on a dealer by dealer basis with that program by that time having been broadened to be available for any program involving sales of houses in excess of 25 units per year (JA 1294-1295). Finally, that document makes it clear that the only purpose in making such loans was making sales of house packages (JA 1296).

In order to provide further evidence concerning plaintiff's position on the "economic power" issue, supplemental witnesses were called by plaintiff in November, 1973.

Ralph Logan, President of Southern Savings & Loan Association, and Charles Will, President of Port-

land Federal Savings & Loan Association, were called. Mr. Logan testified that his Association was not Federally regulated in 1959-1961 but that they were not making land acquisition and development loans, much less 100% such loans. He pointed out that 100% land acquisition and development loans were not prudent due to the risk factor (JA 1711-1716).

Mr. Will's testimony was similar except that his Association was restricted to 60% land acquisition and development loans by Federal regulation. His Association would not have made such loans if it could due to the risk factor. He knew of no one making such loans in the Louisville area during the pertinent period.

The Court found that Portland Federal was able to obtain the same interest rate, a higher service fee and the same maturity for a 60% land acquisition and development when compared to Credit Corporation's loan to plaintiff (JA 1584).

We also called Dr. John Masten as an expert witness. The Court's Findings set forth the substance of Dr. Masten's testimony as follows:

> "The Court finds that Dr. Masten was highly qualified to testify in the lending and economic areas involved in this litigation and Dr. Masten's qualifications were certainly not questioned by counsel for the defendants. Dr. Masten's particular background in Kentucky, including the period of time involved in this lawsuit, especially qualify him to testify about lending policies and practices in the Kentucky area.
>
> Dr. Masten first pointed out that all loans are not the same and that there are risk differentials

that make each loan almost separate in its own characteristics [p. 27]. Assuming that all terms and conditions are the same, Dr. Masten pointed out that the larger the percentage of a land acquisition and development loan to cost of the land acquisition and development, the higher the risk of the loan becomes to the lender [p. 28].

He pointed out that a lender would want to be protected by some type of guarantee, whether it be in the context of the amount of the loan relative to the value of the property or a guarantee by some third party [p. 28]. In other words, normally a lender will lend a borrower money if the borrower could prove that he really doesn't need it [p. 28].

It was brought out that Dr. Masten, in preparing for his testimony, had quite properly reviewed various key exhibits in this case including the Loan Agreement in question [Plaintiff's Exhibit 5], the Underwriting Agreement [Plaintiff's Exhibit 237], the Financial Statement of the defendant, United States Steel Corporation covering 1960-1961 [Plaintiff's Exhibit 31], and the 1961 and 1962 Financial Statement of the Credit Corporation [Attachments to Plaintiff's Exhibit 2].

In response to a hypothetical question which included the basis pertinent facts introduced into evidence in this litigation, such as the undisputed fact that the loans for land acquisition and development from the Credit Corporation to Fortner Enterprises represented 100% of the cost of land acquisition and development thereof, and that as of the time of the first such loan, Fortner Enterprises had a deficit of approximately $16,000.00, and that no personal guarantees were required of any officer of Fortner Enterprises, Dr. Masten testified that a

loan such as was made to Fortner Enterprises would not have been available from normal channels of credit. He pointed out that this was a very unique kind of loan and that it was not the kind of loan you would normally find in the housing credit market at that time [pp. 31, 32].

Dr. Masten pointed out that this loan was unique in and of itself because it represented 100% of the cost of land acquisition and development particularly for the period of time in question. Such a loan is of such a high risk nature so that a prudent lender would have been unwilling to have made a loan involving 100% risk [p. 32].

Dr. Masten pointed out that the period of time in question, namely, 1959, 1960 and 1961, was a period of economic stability and not a period of inflation and that there was a definite risk inherent in a 100% loan under such conditions of economic and price stability [pp. 32, 33]. He referred in support of his testimony that this was a period of economic stability to the wholesale price index.

One of the other unique characteristics of this loan as brought out by Dr. Masten was that the loan was guaranteed, not by an affiliate of the borrower but by an affiliate of the lender, namely: United States Steel Corporation [p. 33]. Dr. Masten went on to point out how highly unusual it is for a company connected with the lender to guarantee the loan to the lender. The normal situation is for a company or person connected with or associated with the borrower to guarantee the loan to the lender [pp. 35, 36].

Dr. Masten also pointed out that the tie-in provisions of the loan themselves made the loan unique and at the same time required the borrower to buy

houses from the Homes Division as a condition of getting this unique type of loan [p. 33].

Dr. Masten pointed out that the rate of interest charged on these loans was 6% with a ½% fee. He pointed out that the prime rate at that time when all cost factors were considered would have run 5 to 5½% and that the loan to Fortner Enterprises was above the prime rate but still low considering the risk involved in making the loan and that it would have been virtually impossible for Fortner Enterprises to have obtained a loan at the level of interest and fee from any other source [pp. 34, 35].

Dr. Masten pointed out that which had been previously established in the record, which was, that banks generally were prohibited by law from making 100% land acquisition and development loans as well as Federally insured savings and loan associations and that other conventional lenders would not have made such loans at the time in question since they were not prudent loans due to the risk involved [p. 37].

It was Dr. Masten's Opinion that the Credit Corporation had economic power by granting terms to the borrower that were so distinctly unique that it was almost inconceivable that the funds could have been acquired from any other source [p. 38].

Dr. Masten pointed out that there are really segments of the credit market and it is not one over-all market. He pointed out that in his opinion 100% land acquisition and development loans of the nature and terms granted to the plaintiff were a segment of the credit market [p. 39], and that if you only have one lender making such loans

within that segment of the market, then that lender has economic power within that segment [p. 39].

Finally, Dr. Masten testified that in his opinion, based on his analysis of the situation, including the nature of the loans made by the Credit Corporation and the Credit Corporation's relationship with United States Steel Corporation that the Credit Corporation had definite leverage in the segment of the credit market related to land acquisition and development loans as a lender because of the uniqueness of the terms of the loans made and that this leverage was exercised [pp. 47, 48]." (JA 1593-1597)

The undisputed evidence was that the U. S. Steel package was priced $455.43 more than the comparable components at the same point in a conventional home (JA 637), and $443.26 more than the Empire pre-fabricated package in a comparable condition (JA 640).

Suffice it to say that after Fortner Enterprises entered into the building program and began making sales of the U. S. Steel packages it encountered problems of defective materials and design in the packages and delays which resulted in the subdivision obtaining a bad reputation and lack of sales with the further result of loss of income and profits to the plaintiff. All of this evidence is in the record and constituted the evidence of causation which the jury considered.

After all other solutions were tried to no avail, plaintiff sought to be relieved of the tie-in requirement at a meeting held between representatives of plaintiff, the Credit Corporation and United States Steel Corporation on June 5, 1962, and this request

for relief was adamantly refused by the Credit Corporation (JA 260-263, 1261-1262). Although plaintiff was current in its accounts with the defendants at that time (JA 1300-1301), the Credit Corporation had an audit of plaintiff made and decided to demand payment of all obligations and institute legal action to collect (JA 1248-1250), and as a result such demand for payment was made on July 12, 1962 (JA 75-76), and one week later this antitrust action was instituted seeking to enjoin their foreclosure action and for damages (JA 38-76).

REASONS FOR DENIAL OF THE WRIT

Respondent will respond to Petitioners' arguments for the granting of the Writ in the order in which those arguments are made.

A. The Decision Below Does Not Conflict With This Court's Mandate in the Case as to the Requisite Proof of "Sufficient Economic Power" Where Financing of a Particular Type is the Tying Element in a Per Se Violation

Petitioners in 1972 filed a Petition for Writ of Certiorari seeking to overturn the Sixth Circuit's 1971 Decision, arguing that they had been entitled to a directed verdict on the "economic power" issue and that the Sixth Circuit had misinterpreted the Supreme Court Opinion in that regard. That Petition was denied in 1972 (406 U. S. 919). The argument presented in the first section of the present Petition is

quite similar to its counterpart of 1972 and is equally without merit.

Petitioners have repeatedly at the appellate stages of the case used the technique of putting together various phrases from the Supreme Court or Sixth Circuit Opinions in the case to distort their holdings and meanings. The Sixth Circuit and the Supreme Court have not been taken in by these efforts.

The majority opinion of the Supreme Court in *Fortner Enterprises* v. *U. S. Steel Corp.*, 394 U. S. 495 (1969), after setting forth the elements of a per se illegal tying arrangement and the evidence then in the record pertaining to the economic power issue, held:

> "Under these circumstances the pleadings and affidavits sufficiently disclose the possibility of market power over borrowers in the credit market to entitle petitioner to go to trial on this issue.
>
> "It may also be, of course, that these allegations will not be sustained when the case goes to trial. It may turn out that the arrangement involved here serves legitimate business purposes and that U. S. Steel's subsidiary does not have a competitive advantage in the credit market. But on the record before us it would be impossible to reach such conclusions as a matter of law, and it is not our function to speculate as to the *ultimate findings of fact.* We therefore conclude that the showing made by petitioner was sufficient on the market power issue." (394 U. S. 495, 506). Emphasis added.

Thus, at minimum, there were fact questions raised on the basis of that record alone which required decision by a fact finder. The majority opinion enumerates various areas of evidence which could prove the requisite economic power including (1) the ability to raise prices, (2) the ability to impose burdensome terms such as a tie-in on any appreciable number of buyers in the market, (3) the ability to charge a higher price for the tied product, (4) unique and unusually advantageous terms in the tying element, (5) Credit Corporation's unique economic ability to provide 100% financing at cheap rates, (6) economic barriers as to other lenders due to risk factor and (7) legal barriers as to other lenders.

The Sixth Circuit both in 1971 and 1975 acknowledged, as had the Supreme Court, that a wide area of evidence could be introduced to establish the requisite economic power.

The District Court as fact finder decided on the basis of much more extensive evidence than was before the Supreme Court in 1969 that the requisite economic power existed (Finding 23, JA 1579). The Sixth Circuit in 1975 upheld the findings since they were not clearly erroneous. The Sixth Circuit points out that the combination of evidence considered by the District Court was sufficient.

The District Court found that the loans by Petitioners' own admissions were "a special type of loan not available from normal or conventional sources" (Finding 24, JA 1579-1580). The loans to Fortner were not available from certain sources due to law or regulation (Finding 28, JA 1581-1582), and were not available from other sources due to the risk factor

(Findings 28-32, JA 1581-1584). The Court found that the purpose of the Credit Corporation's loan program was to help sell house packages, regardless of risk (Finding 35, JA 1588-1589).

The fact finder found that *all* of Credit Corporation's loans involved the tie-in, amounting to over $19,000.00 each year in 1960, 1961 and 1962, with insignificant exceptions (Finding 36, JA 1589-1590). The land acquisition and development loans of Credit Corporation guaranteed by U. S. Steel amounted in 1961 to $7,738,000 while house package sales that year were slightly over $5,000,000 (Finding 37, JA 1590).

The findings were that U. S. Steel elected to use its credit standing to allow the Credit Corporation to obtain funds from others at the prime rate instead of injecting those funds into Credit Corporation itself from its vast resources. Credit Corporation's main expense was payment of interest on its borrowing which it would not have had to do if U. S. Steel had directly injected the capital as it had committed itself to do in the form of stock purchases. The Credit Corporation paid no dividends and had full use of accumulated income (Findings 39-42, JA 1590-1592).

Again we have the finding that the tied product cost $455.00 more than competitive products (Finding 43, JA 1592).

Dr. John Masten was called by Respondent Fortner Enterprises (Finding 44, JA 1592-1597) as an expert witness. Dr. Masten had been at the University of Kentucky for many years up to 1967 and for his last five years there had been the head of the Department

of Economics with his personal background being in the banking and financial fields. In 1967, Dr. Masten went to the University of Georgia where he teaches courses in Commercial Banking and at the graduate level in Money and Capital. His qualifications and expertise were not questioned. The Court found him highly qualified.

Dr. Masten explained the differences in loans (that they were not the same or fungible), and the distinct risk factor present when you have a high ratio of loan to cost of land acquisition and development. Dr. Masten pointed out that the type of or comparable loans as made to Fortner would not have been available from normal channels of credit due to legal prohibitions or economic prohibitions due to the risk factor.

Dr. Masten explained that all of the above factors plus the very unusual situation that U. S. Steel guaranteed the land acquisition loans of Credit Corporation as opposed to the principals of the borrower acting as guarantors were indicia of economic power and in his opinion Credit Corporation had the requisite economic power or leverage and that it had been exercised by imposition of the tying provisions in question.

Thus, the Court's findings as fact finder established more than enough of the many facets of economic power mentioned in Justice Black's decision. There was evidence of a cost advantage to Petitioners. There was evidence of legal and economic prohibitions keeping others from making such loans. There was evidence of the uniqueness of the loans. There was evidence of the multipilicity of the loans containing the

tying provisions imposed by Credit Corporation. There was evidence of the increased price for the tied product. There was evidence of U. S. Steel's vast base of assets and income. There was evidence of the coercion used to enforce the tie.

In its 1975 decision, the Sixth Circuit simply repeated the Supreme Court holding and its own 1971 holding that there were fact questions to be decided by the fact finder on economic power, that there was evidence to support the findings, and affirmed.

A fact finder, be they jury or judge, can weigh and sift the evidence and accept and believe and rely upon some of the evidence and reject and not believe other parts of the evidence. In this case the question was whether the requisite economic power existed at the time the loans to Fortner were made. The fact finder accepted various elements of the proof, much of which was explained by Dr. Masten, which led him to the finding or conclusion that such economic power existed.

Fact finding is not an Appellate Court's function. Certainly it is not within the generally accepted standards for consideration of a Petition for Certiorari.

It is not the Sixth Circuit which has misconstrued and misapplied the Supreme Court decision in this case, it is Petitioners. We will give some examples.

Since Petitioners argued on the appeal to the Supreme Court in 1968 that loans consist of money which is fungible, there could be no economic power in money. The majority opinion recognized that dollars are interchangeable but in responding to that argument pointed out that loans on particular terms, particularly

in the context of this case where two corporations are involved, are different and separate entities which are elements of a tying arrangement. Petitioners persist without evidentiary foundation to argue that loans are fungible because money may be fungible. Yet the evidence in this case has always been that there are different types of loans. This was explained in detail by Dr. John Masten.

We have already demonstrated that Petitioners misconstrued the Supreme Court Opinion in arguing a very narrow ambit of evidence to be available to prove economic power.

One example of taking the Supreme Court Opinion out of context appears at page 11 of the Petition where they state "Justice Black focused squarely upon what is necessary to prove 'that uniquely and unusually advantageous terms are in fact the result of a creditor's unique economic advantages over his competitors.'" What Justice Black actually held was that such unique terms "could reflect", i.e. were evidence of, economic advantage (power) over competitors (394 U. S. 505).

Justice Black in footnote 2 on page 505 simply explained that such uniqueness confers economic power when competitors are prevented legally, physically or economically from offering the distinctive product.

The fact finder found that legal and economic barriers existed, including the cost advantage.

Petitioners argue that cost advantage and higher profitability are both required to prove economic power, but the Supreme Court Opinion does not so

hold. It doesn't mention profitability in that context at all.

The Supreme Court Opinion in this case held "We therefore conclude that the showing made by petitioner [Fortner] was sufficient on the market power issue" (394 U. S. 506). In other words, a prima facie case had been made on behalf of Fortner to overcome the Motion for Summary Judgment and require a trial. The Sixth Circuit in 1971 held that Fortner had made a prima facie case but that the evidence and inferences to be drawn therefrom had created fact issues for the fact finder to decide based on the entire gamut of evidence on the economic power issue. The fact finder evaluated the evidence and made his findings following the principles of the Supreme Court and the Sixth Circuit. In 1975 the Sixth Circuit affirmed. The two opinions of the Sixth Circuit are not inconsistent if read as they were written.

As Respondent Fortner concluded and pointed out in its Response in 1972 to U. S. Steel's Petition for Writ of Certiorari, the Supreme Court should not and will not be imposed upon when asked to review factual questions. This Court has declared the law. It has been properly and laboriously applied in this case. All parties were given every opportunity to present their evidence and argue the facts. The facts were found. They are supported by competent evidence and would certainly withstand a review by this Court. However, we are confident that the highest Court of our land would not entertain a Petition for Writ of Certiorari to review such fact determinations.

B. The Decision Below Does Not Conflict With the Decision of the Third Circuit Court of Appeals Relied Upon by Petitioners

In our Response to the Petition for Writ of Certiorari filed by Petitioners in 1972 we pointed out that the Fourth Circuit Opinion in *Advance Business Systems & Supply Company* v. *S C M Corporation,* 415 F. 2d 455 (4th Cir. 1969), Cert. denied, 397 U. S. 920 (1970), did conflict with the Sixth Circuit's 1971 Opinion in this case since the Fourth Circuit had held that evidence of imposition of an appreciable number of tying arrangements constituted by itself proof of sufficient economic power over the tying element. That holding was in Fortner's favor and would have justified affirmance of the directed verdict given Fortner in 1970, and would have been of no benefit to Petitioners. Obviously Petitioners could not afford to rely upon that alleged conflict in the Circuits again.

Petitioners are reduced to arguing a conflict between Circuits based upon a case out of the Third Circuit in which that Court affirmed *without opinion* a directed verdict for the defendant given by the District Court at the close of the plaintiff's proof. *Anderson* v. *Home Style Stores, Inc.,* 381 F. Supp. 402 (E.D. Pa., 1974), Aff'd w/o Opinion, 511 F. 2d 1392 (3rd Cir. 1975).

In the *Anderson* case, *supra,* the District Court held that it didn't have to decide what other proof of economic power might be sufficient under Fortner, since the plaintiff in that case only argued uniqueness and

utterly failed to prove legal barriers or unprofitability (economic barriers) to others. This was simply a failure of proof. The decision is really not in conflict with the Sixth Circuit or the Supreme Court. The Third Circuit undoubtedly in a proper case with adequate evidence as that presented for Fortner would hold as did the Sixth Circuit.

This is certainly not the type of situation which would call for invocation of Supreme Court jurisdiction.

C. The Decision Below Does Not Raise Significant and Recurring Problems of Great Moment to the General Economy

Since we were dealing with financing as the tying element when this case originally came before this Court, and when the suit was filed, we were of necessity dealing with Section 1 of the Sherman Act. We felt compelled to rely upon the applicable Sherman Act cases such as *International Salt Co.* v. *United States,* 332 U. S. 392, 92 L. Ed. 20, 68 S. Ct. 12, and *Northern Pacific Railway Co.* v. *United States,* 356 U. S. 1, 2 L. Ed. 2d 545, 78 S. Ct. 514. Respondent would have been delighted if Justice Black and the majority of the Court had adopted the reasoning of Milton Handler set forth in two of the Petitioners' citations, 55 Cornell L. Rev. 161 (1970) and Recent Trends in Supreme Court Antitrust Divisions: Commentary-Past, Present and Future, 38 Antitrust L.J. 602, 616-618 (2969). Professor Handler points up the inconsistencies between the law applicable under the

Clayton Act and the Sherman Act concerning tie-ins. He aptly points out there really should be no distinction between a tie-in attack under Section 1 of the Sherman Act or a tie-in attack under the Clayton Act or the Federal Trade Commission Act. There is much logic in having a uniform standard. Respondent feels that the standard should be that appearing in the Clayton Act cases which basically would require only a showing that a not insubstantial amount of commerce in the tied product was affected as a result of the tie. This is the only logical clarification of the tie-in rules which Respondent could envision this Court making. Such a ruling would certainly eliminate any factual issues for a jury in this present case.

Contrary to Petitioners' characterization of this case as being "much publicized", *all* of the "legal commentaries" listed in Appendix D to the Petition were written in 1969 or 1970, shortly after the Supreme Court decision. A number of the articles were written by law students or recent law school graduates and the author of many is not even identified, including the author of the Wall Street Journal editorial cited.

A review of the decisions listed in Appendix E of the Petition leads one to a rather interesting conclusion. The District Courts and Circuit Courts have been able to apply the principles of the Supreme Court's Fortner Opinion without much difficulty. In a number of cases allegations of loans as a tying element survived motions for summary judgment. In others, two different elements or products could not

be identified, so the suits were dismissed since no tie could be established.

Justice Black in his Opinion indicated specifically that the Supreme Court was not passing on the issue of simple credit sales where the sale of a product on credit makes the credit an inseparable part of the purchase price. That type of sale was characterized as being "a far cry" from the arrangement involved in Fortner (394 U. S. 508).

The current Petition for Writ of Certiorari is not the proper vehicle for this Court to pass upon the applicability of the antitrust laws to a simple sale of a product on a time deferred (credit) basis.

Petitioners seek a resolution by this Court of abstract issues which are not before it in this case.

It has been over six years since the Supreme Court Opinion was handed down in this case. The economy has not fallen apart. No National catastrophe related to the decision has occurred.

The prior decision of this Court does not require clarification, and it certainly doesn't require clarification in the context of the posture of a factual finding by a District Court acting as fact finder which was affirmed by the Sixth Circuit. This is no basis for granting the Petition for Writ of Certiorari.

CONCLUSION

Respondent Fortner, when the jury trial was waived in 1973, did so to try to get this protracted litigation over. Yet Petitioners have availed or attempted to avail themselves of every device to overturn the reso-

lution of this matter in Fortner's favor. This Petition is United States Steel's last gasp.

The Supreme Court and the Sixth Circuit held that factual issues were to be resolved concerning economic power. They have been resolved in Respondent's favor and affirmed by the Sixth Circuit. Surely the Supreme Court does not grant Petitions for Writs of Certiorari to review factual determinations.

There is no meaningful conflict between Circuits which would entitle Petitioners to relief from the findings against them.

There are no National or economic reasons for clarification of the previous Fortner Opinion in the context of this case.

Petitioners have not presented any adequate basis for this Court to grant the Petition for Writ of Certiorari and the Petition should be denied.

Respectfully submitted,

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